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Salma bt Yahya v Ramli bin Morad & Anor

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HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22NCVC-78-10 OF
2016
CHAN JIT LI JC
17 JANUARY 2019

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Land Law — Indefeasibility of title — Fraud — Whether plaintiff had locus standi to commence action — Whether first defendant fraudulently transferred asset — Whether second defendant's title to land could be defeated — National Land Code s 340

D

The dispute in the present case was related to two parcels of land known as Lots 147 and 2077 which were originally owned by the deceased. The plaintiff and the first defendant were among the beneficiaries of the estate of the deceased. Initially, the first defendant's father ('Morad') was the administrator of the estate of the deceased but unfortunately, before he could complete the administration of the deceased's estate fully, he passed away. The first defendant then applied for letters of administration *de bonis non* but in the said application, the first defendant had obtained the consent of Morad's beneficiaries only without obtaining the consent of the remaining 55 beneficiaries of the deceased. The second defendant was presently the registered proprietor of Lot 2077 having purchased the same from the previous proprietors ie Morad's beneficiaries. In the present case, the plaintiff argued that the first defendant had committed fraud and deceit when the first defendant willfully failed/refused to disclose to the court all of the beneficiaries entitled under the estate of the deceased when the first defendant applied for the letter of administration *de bonis non*. The issues arose were: (a) whether the plaintiff had the locus standi to institute the present case; (b) whether the lands were the assets of the estate of Morad; and (c) whether the second defendant's title to Lot 2077 could be defeated despite of the fact that his status as a bona fide purchaser for value was conceded.

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Held:

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- (1) As the parties were bound by their pleadings, the first defendant could not resile on his admission in his statement of defence. Accordingly, the court found that the first defendant failed to show that the plaintiff did not have the locus standi to institute the present case (see paras 15–17).
- (2) After considering the evidence, the court was not convinced of the first defendant's claim that the lands were part of Morad's estate. The copy of the court order dated 13 December 1971 produced by the first defendant

was incomplete as paragraph two was missing in the said exhibit. It was unsafe for the court to rely on an incomplete copy of a court order. There was nothing in the said court order that vested the lands in those titles in Morad. The exhibits did not support the first defendant's claim. Although the lands were vested in Morad's name, they were vested in his capacity as 'Orang Yang diberi Kuasa'. If indeed it was true that the lands were part of Morad's estate, there was no necessity for the first defendant to apply for letters of administration *de bonis non*. The first defendant should have just applied for the letters of administration for Morad's estate. Under the circumstances, the documentary evidence that the first defendant relied on did not support his allegation that the lands in this dispute were the assets of Morad's estate. On the other hand, the court found that the plaintiff had shown that the first defendant had fraudulently transferred the assets of the deceased's estate for the benefit of Morad's beneficiaries to the exclusion of the remainder beneficiaries of the estate of the deceased (see paras 19–22 & 24–26).

- (3) The evidence showed that the Morad family did not have the legal capacity to transfer the land to the second defendant. Therefore, the instrument of transfer on which the second defendant relied on was void. It was also undisputed that the second defendant was the immediate purchaser for value. Thus, the court found that the second defendant's title was defeasible by virtue of s 340(2)(b) read with s 340(3) of the NLC (see para 33).

[Bahasa Malaysia summary]

Pertikaian dalam kes ini adalah berkaitan dua bidang tanah dikenali sebagai Lot 147 dan Lot 20177 yang pada asalnya dimiliki oleh si mati. Plaintiff dan defendan pertama adalah antara benefisiari harta pusaka si mati. Pada mulanya, bapa defendan pertama ('Morad') adalah pentadbir harta pusaka si mati tetapi malangnya, sebelum dia dapat menyelesaikan pentadbiran harta pusaka si mati, dia meninggal dunia. Defendan pertama kemudian telah memohon surat pentadbiran *de bonis non* tetapi dalam permohonan tersebut, defendan pertama telah memperoleh persetujuan benefisiari Morad sahaja tanpa memperoleh persetujuan baki 55 benefisiari si mati yang lain. Defendan kedua pada masa ini adalah pemilik berdaftar Lot 2077 setelah membeli yang sama daripada pemilik-pemilik terdahulu iaitu benefisiari Morad. Dalam kes ini, plaintiff berhujah bahawa defendan pertama telah melakukan fraud dan penipuan apabila defendan pertama dengan sengaja gagal/enggan mendedahkan kepada mahkamah semua benefisiari yang berhak di bawah harta pusaka si mati apabila defendan pertama memohon untuk surat pentadbiran *de bonis non*. Isu-isu yang timbul adalah: (a) sama ada plaintiff mempunyai locus standi untuk memulakan kes ini; (b) sama ada tanah tersebut adalah aset harta pusaka Morad; dan (c) sama ada hak milik defendan kedua untuk Lot 2077 boleh dilucutkan walaupun pada hakikatnya statusnya sebagai

A pembeli bona fide untuk nilai adalah diakui.

Diputuskan:

- B (1) Oleh kerana pihak-pihak terikat oleh pliding mereka, defendan pertama tidak dapat bergantung kepada pengakuannya dalam kenyataan pembelaannya. Oleh demikian, mahkamah mendapati bahawa defendan pertama telah gagal menunjukkan plaintif tidak mempunyai locus standi untuk memulakan kes ini (lihat perenggan 15–17).
- C (2) Setelah mempertimbangkan keterangan, mahkamah tidak yakin dengan tuntutan defendan pertama bahawa tanah tersebut adalah sebahagian daripada harta pusaka Morad. Salinan perintah mahkamah bertarikh 13 Disember 1971 yang dikemukakan oleh defendan pertama tidak lengkap kerana perenggan dua tiada dalam ekshibit tersebut. Ia tidak selamat untuk mahkamah bergantung kepada salinan perintah mahkamah yang tidak lengkap. Tiada apa dalam perintah mahkamah tersebut yang memberikan hak milik tanah tersebut kepada Morad. Ekshibit tersebut tidak menyokong tuntutan defendna eptama. Walau pun tanah tersebut terletak atas nama Morad, ia terletak dalam kapasitinya sebagai ‘Orang Yang diberi Kuasa’. Jika pun ia benar bahawa tanah tersebut adalah sebahagian daripada harta pusaka Morad, tiada keperluan untuk defendan pertama memohon surat pentadbiran *de bonis non*. Defendan pertama sepatutnya hanya memohon surat pentadbiran untuk harta pusaka Morad. Di bawah keadaan sedemikian, keterangan
- D dokumentar yang defendan pertama bergantung kepada tidak menyokong dakwaannya bahawa tanah tersebut dalam pertikaian ini adalah merupakan aset harta pusaka Morad. Sebaliknya, mahkamah mendapati bahawa plaintif telah menunjukkan defendan pertama secara fraud telah memindah milik aset harta pusaka si mati untuk manfaat
- E benefisiari Morad dan mengecualikan benefisiari harta pusaka si mati yang lain (lihat perenggan 19–22 & 24–26).
- F (3) Keterangan menunjukkan bahawa keluarga Morad tidak mempunyai kapasiti undang-undang untuk memindah milik tanah tersebut kepada defendan kedua. Oleh itu, instrument pindah milik yang defendan kedua bergantung kepada adalah tidak sah. Ia juga tidak dipertikaikan bahawa defendan kedua adalah pembeli untuk nilai yang pertama. Oleh itu, mahkamah mendapati bahawa hak milik defendan kedua boleh disangkal menurut s 340(2)(b) dibaca bersama s 340(3) KTN (lihat perenggan 33).]
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Notes

For cases on fraud, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3720–3723.

Cases referred to

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (folld)

A

Legislation referred to

National Land Code s 340, 340(2)(b), (3)

B

Ang Khoon Cheong (Noorlaili bt Aziz with him) (Laili & Co) for the plaintiff.
Mohd Jasri bin Othman (Mohd Jasri & Co) for the first defendant.
Shanmugaiah a/l Chelliah (C Shanmugaiah & Co) for the second defendant.

C

Chan Jit Li JC:

[1] The plaintiff, Salma bt Yahya ('Salma'), and the first defendant, Ramli bin Morad ('Ramli'), are related. They share a common grandfather, namely, one Hj Ahmad bin Hj Idris ('the deceased').

D

[2] The dispute in this case relates to two parcels of land held in GM 21491 Lot 147, Bandar Alor Setar, Mergong, Daerah Kota Setar, Kedah Darul Aman and GM 2602, Lot 2077 Mk Sg Daun, Daerah Yan, Kedah Darul Aman ('Lot 147' and 'Lot 2077' respectively). The deceased was the original registered proprietor of the lands.

E

[3] The plaintiff's cause of action against the first defendant is premised on fraud.

F

[4] The second defendant, Abdullah bin Othman ('Abdullah'), is presently the registered proprietor of Lot 2077 having purchased the same from the previous proprietors. The plaintiff is seeking the return of this parcel of land from the second defendant and the plaintiff's premise for the relief is s 340 of the National Land Code ('the NLC') specifically the exceptions to the indefeasibility of title.

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[5] The undisputed facts are as follows. The deceased passed away on 5 June 1956. The lands formed part of his estate. The 'Surat Perakuan Faraid' of 14 February 2007 (exh P3) lists 55 beneficiaries in this estate. Although the plaintiff has tendered a detailed family tree (exh P27) it suffices for the purpose of this judgment to state that the plaintiff and the first defendant are among the said 55 beneficiaries.

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[6] On 5 May 1965, one Hj Morad bin Hj Ahmad ('Morad') obtained the letters of administration to administer the estate of the deceased (exh P2). Morad is the first defendant's father.

A [7] Unfortunately, before Morad could complete the administration of the deceased's estate fully, he passed away on 11 May 2002. The first defendant, Ramli, proceeded to apply for letters of administration *de bonis non* for the purpose of administering the estate of the deceased. However, in his application for the letters of administration *de bonis non* the first defendant did not endeavour to secure the consent of the remainder of the said 55 beneficiaries of the estate of the deceased. Instead, the first defendant obtained the consent of Morad's beneficiaries only. The beneficiaries of Morad's estate comprised of ten persons, and they are Ishak bin Morad, Abu Bakar bin Hj Morad, Ramli bin Morad ('the first defendant'), Osma bt Morad, Salmah bt Hj Morad, Roshitoh bt Hj Morad, Jamaliah bt Morad, Sariah bt Hj Morad, Siti Hajar bt Morad and Siti Meriam bt Hj Morad ('Morad's beneficiaries'.)

D [8] The first defendant was granted the letters of administration *de bonis non* (exh P24) on 15 March 2005.

E [9] The first defendant proceed to transfer Lot 147 to himself as the second administrator of the estate of the deceased. This is evidenced by a land search (exh P12). However, in respect of Lot 2077, the first defendant obtained a court order on 29 October 2013 to transfer Lot 2077 to only Morad's beneficiaries. After the transfer was effected, Morad's beneficiaries sold and transferred Lot 2077 to the second defendant, Abdullah.

F [10] It is the plaintiff's case that the first defendant committed fraud and deceit when the first defendant applied for the letters of administration *de bonis non*. The fraud and deceit was committed when the first defendant wilfully failed refused to disclose to the court all of the beneficiaries entitled under the estate of the deceased. The wilful non-disclosure was practiced for the sole purpose of securing both these lands for the benefit of Morad's beneficiaries (including the first defendant) only to the exclusion of all the remaining beneficiaries entitled to the estate of the deceased.

G [11] The gist of the plaintiff's case against both the defendants is pleaded as follows:

H 13. Pindahmilik hartanah tersebut di atas kepada Defendan Kedua dicemari frod.

BUTIR-BUTIR FROD

- I (a) Defendan Pertama dengan penuh pengetahuan secara salah dan menyalahi undang-undang mendapatkan Surat Kuasa Mentadbir (*De Bonis Non*) tanpa keizinan kesemua waris.
- (b) Defendan Pertama dengan penuh pengetahuan secara salah dan menyalahi undang-undang mendapatkan Perintah bertarikh 29/10/2013 untuk meletakkan hak hartanah tersebut kepada 10 orang waris tersebut sahaja;

- (c) Hartanah tersebut dijual dan dipindahmilik kepada Defendan Kedua untuk membolehkan 9 orang waris tersebut dan Defendan Pertama untuk mengaut keuntungan yang tidak adil. A

14. Selanjutnya dan secara alternative, pindahmilik kepada Defendan Kedua tersebut dibuat tanpa suratcara yang mencukupi (*insufficient instrument*) atau suratcara yang terbatal (*void instrument*) yakni Surat Kuasa Mentadbir (*De Bonis Non*) dan Perintah bertarikh 29/10/2013 tersebut adalah tidak sah dari segi undang-undang yang terbatal. B

[12] Thus, by way of the instant suit the plaintiff seeks the following reliefs: C

DAN Plaintiff menuntut:

1. Bahawa Surat Kuasa Mentadbir (De Bonis Non) bertarikh 15/03/2005 dimansuhkan dan terbatal;
2. Bahawa Perintah Mahkamah bertarikh 29/10/2013 diketepikan; D
3. Satu deklarasi bahawa perletakan hak hartanah yang dikenali sebagai GM No 21491 Lot No 147, Mukim Bandar Alor Setar, Daerah Kota Setar, Negeri Kedah Darul Aman ke atas nama Defendan Pertama adalah tidak sah dari segi undang-undang dan terbatal; E
4. Satu deklarasi bahawa turunmilik hartanah yang dikenali sebagai GM No 2602, Lot No 2077, Mukim Sungai Daun, Daerah Yan, Negeri Kedah Darul Aman ke atas 10 orang waris iaitu:
 - i. Osma Binti Morad;
 - ii. Ishak Bin Morad; F
 - iii. Salmah Binti Haji Morad;
 - iv. Roshitoh Binti Haji Morad;
 - v. Jamliah Binti Haji Morad; G
 - vi. Sariah Binti Haji Morad;
 - vii. Siti Hajar Binti Haji Morad;
 - viii. Abu Bakar Binti Haji Morad;
 - ix. Ramli Binti Morad; (*Defendan Pertama*) H
 - x. Siti Meriam Binti Morad.

adalah tidak sah dari segi undang-undang dan terbatal.
5. Suatu deklarasi bahawa pindahmilik hartanah yang dikenali sebagai GM No 2602, Lot No 2077, Mukim Sungai Daun, Daerah Yan, Negeri Kedah Darul Aman kepada Abdullah Bin Othman adalah tidak sah dari segi undang-undang dan terbatal; I
6. Bahawa Pejabat Tanah dan Daerah Kota Setar dan/atau Pendaftar Hakmilik dan/atau mana-mana pihak berkuasa tanah yang berkaitan

- A** membatalkan segala memoriam berkaitan dengan pendaftaran nama Defendan Pertama sebagai pemilik berdaftar (dalam kapasitinya sebagai Pentadbir 2) hartanah yang dikenali sebagai GM No 21491 Lot No 147, Mukim Bandar Alor Setar, Daerah Kota Setar, Negeri Kedah Darul Aman;
- B** 7. Bahawa Pejabat Tanah dan Daerah Kota Setar dan/atau Pendaftar Hakmilik dan/atau mana-mana pihak berkuasa tanah yang berkaitan mendaftarkan/meletak hak nama Haji Ahmad bin Haji Idris sebagai pemilik berdaftar hartanah yang dikenali sebagai GM No 21491 Lot No 147, Mukim Bandar Alor Setar, Daerah Kota Setar, Negeri Kedah Darul Aman;
- C** 8. Bahawa Pejabat Tanah dan Daerah Yan dan/atau Pendaftar Hakmilik dan/atau mana-mana pihak berkuasa tanah yang berkaitan membatalkan segala memoriam berkaitan dengan pendaftaran nama Defendan Kedua sebagai pemilik berdaftar hartanah yang dikenali sebagai GM Lot No 2602, Lot No 2077, Mukim Sungai Daun, Daerah Yan, Negeri Kedah Darul Aman;
- D** 9. Bahawa Pejabat Tanah dan Dearah Yan dan/atau Pendaftar Hakmilik dan/atau mana-mana pihak berkuasa tanah yang berkaitan mendaftarkan/meletak hak nama Haji Ahmad bin Haji Idris sebagai pemilik berdaftar hartanah yang dikenali sebagai GM No 2602, Lot No 2077, Mukim Sungai Daun, Daerah Yan, Negeri Kedah Darul Aman;
- E** 10. Gantirugi yang dialami oleh Plaintiff ditaksirkan oleh Timbalan Pendaftar;
- F** 11. Kos; dan
12. Apa-apa relif yang difikirkan wajar dan suaimanfaat oleh Mahkamah Yang Mulia ini.
- G** [13] Apart from filing his statement of defence, the first defendant has made a counter claim against the plaintiff. By his pleading, the first defendant alleges that the plaintiff's claim is misconceived as the lands are the assets in Morad's estate. And, because of the wrongful suit, he (the first defendant) has suffered loss. The loss arise from the legal fees in defending this action and the profits the first defendant would have secured in from a joint venture agreement in respect of Lot 147. Thus the first defendant seeks the following
- H**
17. Oleh yang demikian, Defendan Pertama ini membuat tuntutan terhadap Plaintiff seperti berikut:
- I**
- i) Ganturugi Am sebanyak RM150,000.00 di atas tekanan tindakan Plaintiff terhadap Defendan Pertama tanpa asas yang kukuh
 - ii) Gantirugi Teladan sebanyak RM150,000.00
 - iii) Fee guaman atas dasar peguam klien sebanyak RM45,000.00

- iv) Gantirugi di atas nilai harga pasaran hartanah yang tidak dapat dimajukan oleh pemaju sejak 10/12/2007 untuk ditaksirkan oleh Mahkamah Yang Mulia ini. A
- v) Gantirugi di atas nilai harga pasaran semasa hartanah yang terkini untuk ditaksirkan oleh Mahkamah Yang Mulia ini bermula dari tarikh saman difailkan oleh Plaintiff sehingga penyelesaian penuh kes B
- vi) Faedah pada kadar 5% setahun di atas gantirugi yang ditaksirkan dari tarikh penghakiman sehingga pembayaran penuh.
- vii) Kos tindakan ini C
- viii) Lain-lain relif yang dianggap suaimanfaat oleh Mahkamah Yang Mulia ini.

THE PLAINTIFF'S CASE AGAINST THE FIRST DEFENDANT

[14] The first defendant contends that the plaintiff's claim must fail on account of two issues. The issues are: (i) that the plaintiff has no locus standi to institute the present action; and (ii) that the lands belong to the estate of Morad and not the deceased. D

(i) Whether the plaintiff has the locus standi to institute the instant case E

[15] En Mohd Jasri bin Othman ('En Jasri'), the learned counsel for the first defendant, submits that the plaintiff had failed to adduce evidence to show the nature of her relationship with the deceased. With this omission the plaintiff has failed to show that she is entitled to the estate of the deceased. Accordingly, she has failed to establish her locus to institute the instant case. F

[16] With the greatest of respect to the learned counsel, I find this submission to be without merit. In para 4 of the statement of claim, the plaintiff pleads as follows: G

4. Plaintiff adalah seorang cucu perempuan kepada Haji Ahmad bin Haji Idris, simati dan salah seorang waris kepada Harta Pusaka Haji Ahmad bin Haji Idris, simati yang meninggal dunia pada 5/06/1956. Waris-waris kepada Harta Pusaka Haji Ahmad bin Haji Idris mengikut Surat Perakuan Faraid 14/02/2007 terdiri daripada 55 orang waris seperti berikut: H

NAMA WARIS-WARIS.

- (i) Che Wa Binti Said I
- (ii) Salama binti Yahya – (Plaintif)
- (iii) ...

A By way of para 5 of his statement of defence the first defendant admitted the whole of this paragraph.

B [17] As parties are bound by their pleadings, the first defendant cannot now resile on his admission. Accordingly, I find that the first defendant has failed to show that the plaintiff does not have the locus standi to institute the present case.

(ii) Whether the lands are the assets of the estate of Morad

C [18] The first defendant concedes that the lands were originally the assets in the estate of the deceased. However, the lands ceased to be the assets of the estate of the deceased after Morad's administration of the estate. The first defendant claims that by way of Morad's lawful administration it and distribution these lands became vested in Morad personally. Therefore, these lands rightfully became part of Morad's estate on Morad's death. As such his (the first defendant's) distribution of the lands to Morad's beneficiaries was in accordance to the law.

E The first defendant relies on the High Court order of 13 December 1971 (exh D16) and a copy of the land titles of Lot 147 and Lot 2077 (exhs D28 and D30, respectively) in support of his claim of ownership.

F [19] After considering the evidence before me I find that I am not convinced of the first defendant's claim that the lands are part of Morad's estate for the following reasons.

G [20] The court order of 13 December 1971 was obtained at the High Court of Malaya at Alor Setar vide Originating Summons No 18 of 1966. The copy of the order (exh D16) produced by the first defendant is incomplete. Paragraph '2' is missing in the said exhibit. I find it unsafe to rely on an incomplete copy of a court order.

H [21] In his written submission, En Jasri identifies the lands in this dispute. He submits that Lot 147 was originally held in grant SP No 4904 and Lot 2077 was held in SPK No 2677. There is nothing in the said court order (exh D16) that vest the lands in those titles in Morad. Paragraph 1 of this order at most vests in Morad only 3/8 share of the lands in dispute. Paragraph 6 of the said order which vests in Morad the whole of certain pieces of lands are not the subject matter of this dispute.

I [22] It is therefore my finding that the court order of 13 December 1971 does not vest the disputed lands in Morad as alleged by the first defendant.

[23] During the trial, the first defendant produced as exhs D28 and D30, the land titles for both Lot 147 and Lot 2077 respectively. The first defendant claims that these exhibits name Morad as the registered proprietor. A

[24] I find that the exhibits do not support the first defendant's claim. Although the lands were vested in Morad's name, they were vested in his (Morad) capacity as 'Orang Yang diberi Kuasa'. In addition to this, I would like to add that if indeed it was true that the lands were part of Morad's estate, there was no necessity for the first defendant to apply for letters of administration *de bonis non*. The first defendant should have just applied for the letters of administration for Morad's estate. B
C

[25] Under the circumstances, I find that the documentary evidence (the court order of 13 December 1971 and the land titles) the first defendant relies on do not support his allegation that the lands in this dispute are the assets of Morad's estate. D

[26] On the other hand, I find that the plaintiff has shown that the first defendant had fraudulently transferred the assets of the deceased's estate for the benefit of Morad's beneficiaries to the exclusion of the remainder beneficiaries of the estate of the deceased. E

THE PLAINTIFF AGAINST THE SECOND DEFENDANT

[27] The second defendant maintains that he is a bona fide purchaser for value for Lot 2077. He had purchased the land from Morad's beneficiaries who were the registered proprietors of the land at the time of his purchase. Hence, the plaintiff's claim against him must be dismissed. F

[28] The plaintiff concedes that the second defendant was not a party to the first defendant's fraud. The plaintiff also concedes that the second defendant was a bona fide purchaser for value of Lot 2077. However, En Ang Khoon Cheong ('En Ang'), the learned counsel for the plaintiff, submits that the second defendant's title is defeasible as the registration of his ownership was by means of a void instrument. This is because the purported landowners, namely, Morad's beneficiaries, from whom he (the second defendant) purchased the land from did not have a valid title to pass to him. The instrument of transfer was void. En Ang relies on s 340(2)(b) and (3) of the NLC in support of his submission. G
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[29] En Shanmugaiah a/l Chelliah, the learned counsel for the second defendant submits that En Ang's argument on s 340 of the NLC is irrelevant as the plaintiff has no locus to institute the present suit.

- A** [30] I find it unnecessary to deal with this issue of the plaintiff's locus as I had already made a finding on this issue in assessing the plaintiff's claim against the first defendant. I shall now turn to En Ang's submission in respect of s 340 of the NLC. The issue to be determined is whether the second defendant's title to Lot 2077 can be defeated in spite of the fact that his status as a bona fide purchaser for value is conceded.
- B**

[31] Section 340 of the NLC provides as follows:

- 340 Registration to confer indefeasible title or interest, except in certain circumstances.
- C**
- (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
- D**
- (2) The title or interest of any such person or body shall not be indefeasible:
- E**
- (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
- (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
- F**
- (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
- (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s. (2):
- G**
- (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
- (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.
- Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

- H**
- [32] *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 is instructive on this issue. The plaintiff in *Tan Ying Hong* was the registered proprietor of certain pieces of land. The first defendant created a fraudulent power of attorney and proceeded to charge the lands to the third defendant-bank. The charges were to secure financial funds for the second defendant. The Federal Court speaking through Arifin Zakaria CJ (Malaya) (as he then was) held (at p 294):
- I**

[55] Reverting to the facts of this case, it is not in dispute that the two charges registered in favour of the third respondent were based on void instruments as the

relevant Forms 16A were not executed by the appellant. They were executed by the first respondent pursuant to a forged PA. Thus, the charge instruments (Form 16A) used in the present case were indisputably void instruments. It follows, therefore, that the two charges in this case are liable to be set aside under s 340(2)(b) since they are based on void instruments.

A

[56] The third respondent is an immediate holder of these charges. That being the position, the third respondent could not take advantage of the proviso to sub-s (3) of s 340.

B

[33] The evidence shows that the Morad family did not have the legal capacity to transfer the land to the second defendant. Therefore the instrument of transfer on which the second defendant relies on is void. It is also undisputed that the second defendant is the immediate purchaser for value. Thus guided by *Tan Ying Hong* I find that the second defendant's title is defeasible by virtue of s 340(2)(b) read with s 340(3) of the NLC.

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[34] In view of the findings I have made in this case, I enter judgment in favour of the plaintiff on the following terms:

- (a) that prayers 1 and 2 of the reliefs sought in the statement of claim are allowed;
- (b) that all the transfers effected by the first defendant in relation to the lands in this dispute are declared illegal, null and void and are be set aside;
- (c) that prayers 5, 6, 7, 8 and 9 of the reliefs sought in the statement of claim are allowed;
- (d) that the plaintiff is accorded costs of RM35,000 against the first defendant and RM10,000 against the second defendant; and
- (e) that the first defendant's counter claim is dismissed.

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Order accordingly.

Reported by Mohd Kamarul Anwar

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